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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 JAMES ARNOLD COX, JR.,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

12 Defendant.
13

Case No. C11-416-TSZ-BAT

**REPORT AND
RECOMMENDATION**

14 James Arnold Cox, Jr. seeks review of the denial of his Supplemental Security Income
15 application. He contends that the ALJ erred by (1) rejecting the opinion of his treating physician,
16 (2) improperly evaluating lay witness evidence; (3) rejecting plaintiff's testimony, (4) improperly
17 formulating plaintiff's RFC, and (5) failing to find that plaintiff was limited to sedentary work
18 and therefore disabled as of his 50th birthday. Dkt. 15. As discussed below, the Court
19 recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

20 **FACTUAL AND PROCEDURAL HISTORY**

21 James Arnold Cox, Jr. is currently 54 years old, has completed the 12th grade, and has
22 owned a construction company, worked in the construction industry as a parts and materials
23 laborer, maintenance worker, and heavy equipment operator. He also worked for utility

1 companies as a waste water technician, maintenance worker, and geophysics technician.¹

2 In October 2004, plaintiff was admitted to the hospital for treatment of congestive heart
3 failure and atrial fibrillation. Tr. 14. He was subsequently diagnosed with bilateral torn
4 meniscuses. Tr. 189.

5 On September 18, 2006, plaintiff applied for benefits, alleging disability as of October 4,
6 2004. Tr. 106. His application was denied initially and on reconsideration. Tr. 69, 74. The ALJ
7 conducted a hearing on April 7, 2009, finding Mr. Cox not disabled. Tr. 9-20. As the Appeals
8 Council denied Mr. Cox's request for review, the ALJ's decision is the Commissioner's final
9 decision. Tr. 1.

10 THE ALJ'S DECISION

11 Utilizing the five-step disability evaluation process,² the ALJ made the following
12 findings:

13 **Step one:** Mr. Cox had not engaged in substantial gainful activity since September 8,
14 2006. Tr. 14.

15 **Step two:** Mr. Cox had the following severe impairments: history of congestive heart
16 failure, cardiomyopathy, and right knee meniscus tear. *Id.*

17 **Step three:** These impairments did not meet or equal the requirements of a listed
18 impairment.³

19 **Residual Functional Capacity:** Mr. Cox had the residual functional capacity to perform
20 light work as follows: He can occasionally lift 20 pounds and can frequently lift 10
21 pounds. He can stand and/or walk and can sit about six hours in an eight hour day with
22 normal breaks. Due to some limitations with the lower extremities, he can occasionally
use the lower extremities to operate foot controls requiring pushing or pulling. Mr. Cox
can never climb ladders, ropes, or scaffolding. Mr. Cox can occasionally climb stairs and
ramps, balance, kneel, crouch, and crawl. He should not operate hazardous machinery or
equipment or work at heights. He should avoid extreme cold and extreme heat, and
should avoid working in environments with fumes, odors, dusts, gases, and poor

23 ¹ Tr. 67, 106, 125.

² 20 C.F.R. §§ 404.1520, 416.920.

³ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 ventilation. Tr. 15-16.

2 **Step four:** Mr. Cox could not perform his past work. Tr. 19

3 **Step five:** As there are jobs Mr. Cox can perform, he is not disabled. *Id.*

4 **DISCUSSION**

5 Plaintiff contends that the ALJ erred in several ways. Because the ALJ relied on her
6 determination of plaintiff's credibility to reject the opinions of the treating physician and the lay
7 witness, the court will first address that credibility determination.

8 **A. Plaintiff's Credibility**

9 Plaintiff contends that the ALJ erred by rejecting his testimony without providing clear
10 and convincing reasons. The ALJ explained,

11 After careful consideration of the evidence, I find that the claimant's medically
12 determinable impairments could reasonably be expected to cause some of the alleged
13 symptoms; however, the claimant's statements concerning the intensity, persistence and
limiting effects of these symptoms are not credible to the extent they are inconsistent with
the above residual functional capacity assessment.

14 The overall record and objective medical evidence do not support the alleged severity of
the claimant's symptoms and limitations due to his impairments.

15 Tr. 16-17.

16 Once the plaintiff produces medical evidence of an underlying impairment, the
17 Commissioner may not discredit the plaintiff's testimony as to subjective symptoms merely
18 because they are unsupported by objective evidence.⁴ Instead, where there is no affirmative
19 evidence showing that the plaintiff is malingering, the Commissioner's reasons for rejecting the
20 plaintiff's testimony must be "clear and convincing."⁵ "General findings are insufficient; rather,
21 the ALJ must identify what testimony is not credible and what evidence undermines the
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23 ⁴ *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc).

⁵ *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (internal quotation omitted).

1 plaintiff's complaints."⁶ There is no evidence of malingering in this case.

2 Plaintiff stated that due to his impairments, he was unable to stand for long periods, and
3 could not squat, kneel, bend, or climb stairs without help. Tr. 16. He also indicated that his
4 knees gave out when he walked, and estimated that he could not walk more than 100 feet before
5 he had to stop and rest. *Id.* During the hearing, he complained of ongoing fatigue and explained
6 that when his knees swelled, he was unable to walk. Tr. 29, 31. The plaintiff explained that he
7 lived with a landlord/caretaker who does most of the shopping, cooking, and cleaning, and that
8 he was no longer able to engage in his former hobbies of riding horses and motorcycles. Tr. 38.

9 The ALJ provided three reasons for rejecting plaintiff's testimony. First, the ALJ found
10 that despite plaintiff's statement to the contrary, the record did not reflect that a physician had
11 prescribed the use of a cane or crutches. Tr. 17. The ALJ also noted that the plaintiff arrived at
12 the hearing without crutches, explaining that he left his crutch in his vehicle because he was late.
13 Those facts support the ALJ's conclusion that plaintiff did not require the use of a cane or
14 crutches to walk. "In determining credibility, an ALJ may engage in ordinary techniques of
15 credibility evaluation, such as considering claimant's reputation for truthfulness and
16 inconsistencies in claimant's testimony."⁷ However, the ALJ did not rely on those facts to
17 conclude that plaintiff was not a credible witness. Nor did she conclude that the absence of a
18 prescription for an ambulation aid translates into an ability to walk or stand for prolonged
19 periods. In fact, Dr. Sharon Levine, plaintiff's treating physician, noted marked limitations and
20 recommended a limitation to sedentary work even though she did not prescribe, or mention,
21 ambulation aids in her records. Therefore, under the ALJ's own analysis, the fact that plaintiff
22 does not require the use of crutches does not undermine his overall credibility regarding the

23 ⁶ *Id.*

⁷ *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

1 severity of his symptoms and his limitations.

2 Second, the ALJ found that plaintiff's daily activities were inconsistent with the alleged
3 severity of his impairments. Tr. 17. Daily activities that are inconsistent with alleged symptoms
4 are relevant to a credibility determination.⁸ In this case, however, the ALJ relied on activities of
5 daily living that are not inconsistent with the severity of plaintiff's impairments. For example,
6 the ALJ offered no explanation regarding why he found that plaintiff's alleged fatigue and
7 limitations with standing and walking were inconsistent with the fact that he could attend to his
8 personal care needs, did not need reminders to do so or to take medication, and could
9 occasionally ride in a car and visit others, none of which requires significant exertion or
10 prolonged standing and walking. Nor are those activities transferable to work skills.⁹

11 In addition to relying on largely irrelevant activities, the ALJ overstated plaintiff's
12 testimony that he could prepare his own meals, mow his yard, and shop in stores two or three
13 times a month. Tr. 17. In fact, plaintiff testified that when he goes to the grocery store, he
14 "[h]angs onto the shopping cart" like a crutch and can stand for only about 20 minutes before he
15 needs to rest. Tr. 33-34. Similarly, plaintiff explained that he mows the lawn only occasionally,
16 with a self-propelled mower, and can mow for only 5-10 minutes before needing a break because
17 his knees "take a beating out there." Tr. 34; *id.* at 34-35 (explaining that it usually takes him
18 three days to mow the yard even though it is not very large); *id.* at 38 (explaining that his
19 landlord/caretaker typically makes his meals, but he is able to warm up leftovers or prepare soup
20 and a sandwich). Moreover, the fact that a plaintiff can engage in some daily activities,

21 ⁸ See, e.g., *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

22 ⁹ See, e.g., *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (explaining that the ALJ must make
23 "specific findings relating to the daily activities and their transferability to conclude that a
claimant's daily activities warrant an adverse credibility determination.") (internal citation and
quotation omitted).

1 including “grocery shopping, driving a car, or limited walking for exercise, does not in any way
2 detract from [his] credibility as to [his] overall disability. One does not need to be ‘utterly
3 incapacitated’ in order to be disabled.”¹⁰ Therefore, the plaintiff’s daily activities do not
4 undermine his credibility or reflect skills and abilities that are transferable to the workplace.

5 Third, the ALJ found that the medical evidence did not support plaintiff’s testimony
6 regarding the severity of his limitations. The ALJ noted that a cardiologist wrote that plaintiff
7 had “done well” since his cardiac catheterization in July 2006 and that plaintiff denied symptoms
8 of cardiac dysfunction. Tr. 17, 323. Even if plaintiff’s cardiac functioning had improved,
9 however, he undisputedly continued to suffer from congestive heart failure and dilated
10 cardiomyopathy. Tr. 235. Moreover, the ALJ did not explain how, or whether, the cardiac
11 improvement was relevant to the plaintiff’s professed inability to stand or walk for extended
12 periods due to knee pain. Instead, the ALJ noted that Dr. Gary Hunter, an orthopedic surgeon,
13 opined that plaintiff was “relatively asymptomatic.” Tr. 17. The ALJ took that statement out of
14 context; the full sentence stated, “Currently Mr. Cox states his knee pain is disabling at times,
15 although he is relatively asymptomatic today.” Tr. 189. Variations in the intensity of symptoms
16 is typical and does not negate a claimant’s credibility.¹¹ Although the ALJ noted some of Dr.
17 Hunter’s findings, he omitted others that support plaintiff’s testimony, including the fact that Dr.
18 Hunter diagnosed a torn medial meniscus of the right knee, a torn lateral meniscus of the left
19 knee, and suspect recurrent effusion. Tr. 189. Dr. Hunter recommended “partial medial
20 meniscetomy with debridement of the right knee initially.” *Id.* As plaintiff notes, it appears
21 unlikely that the physician would have recommended an unnecessary surgery. The ALJ erred by
22 selectively focusing on only certain aspects of Dr. Hunter’s report and disregarding other aspects

23 ¹⁰ *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

¹¹ SSR 96-7p.

1 that support a finding of disability.¹²

2 In concluding that plaintiff's testimony was inconsistent with the medical evidence, the
3 ALJ also failed to consider the fact that his testimony was fully consistent with Dr. Levine's
4 finding of "marked" limitations due to his knee condition. It was also consistent with Dr.
5 Levine's findings in June 2008 of knee swelling, heat, and decreased flexion, and with plaintiff's
6 report of incapacitating knee pain at that time. Tr. 380. The ALJ also noted that a May 2007 x-
7 ray was normal, but fails to explain how that undermines plaintiff's credibility, particularly in
8 light of the undisputed MRI findings of bi-lateral torn meniscuses. Therefore, the ALJ erred in
9 concluding that the medical evidence undermined plaintiff's credibility and failed to provide
10 clear and convincing reasons for rejecting his testimony.

11 **B. Plaintiff's Treating Physician**

12 Plaintiff argues that the ALJ erred in rejecting Dr. Levine's opinions. In July 2005, Dr.
13 Levine opined that plaintiff's congestive heart failure and cardiomyopathy caused marked
14 limitations in the plaintiff's ability to perform one or more basic work related activities and
15 limited the plaintiff to sedentary work. Tr. 200-07. In a May 2006 physical evaluation, Dr.
16 Levine opined that the plaintiff's cardiomyopathy and left meniscus tear caused marked
17 limitations in the plaintiff's ability to perform one or more basic work related activities and
18 limited the plaintiff to sedentary work. Tr. 202, 206.

19 Dr. Levine's opinion was contradicted by the opinion of Dr. Diana Shearer,¹³ a non-
20 examining physician who reviewed the record evidence and concluded that plaintiff could

21 ¹² See, e.g., *Winans v. Bowen*, 853 F.2d 643 (9th Cir. 1987).

22 ¹³ Plaintiff contends that the ALJ erred by crediting the opinion of a non-physician disability
23 evaluator and referring to her as a physician. Tr. 18. However, the error was harmless. Because
Dr. Shearer reached the same conclusions, the error did not affect the outcome of the disability
determination. See, e.g., *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir.
2006).

1 perform light work. Tr. 370-77. Therefore, the ALJ could reject Dr. Levine's opinion by
2 providing "specific and legitimate reasons that are supported by substantial evidence."¹⁴ The
3 ALJ rejected Dr. Levine's opinion in part because it was inconsistent with "claimant's own
4 reports of his abilities." Tr. 18. Because, as set forth above, the ALJ erred in finding that
5 inconsistency, it is not a legitimate reason to reject Dr. Levine's opinion.

6 The ALJ also justified her rejection of Dr. Levine's opinions by stating that they were
7 inconsistent with the medical evidence. As the ALJ noted, plaintiff underwent a Myoview stress
8 test approximately one month after Dr. Levine's second report. Plaintiff exercised for
9 approximately eight minutes before stopping the test due to fatigue. Tr. 328. As a result of the
10 stress test, Dr. Robert Middleton opined that the plaintiff had "fairly good exercise capacity" and
11 normal blood pressure in response to exercise. Tr. 17, 328. Both Dr. Middleton's and Dr.
12 Shearer's opinions were based on that objective data, and are therefore substantial evidence
13 regarding the limitations stemming from plaintiff's cardiac impairments.¹⁵ Plaintiff also argues
14 that his cardiologist, Dr. Kevin Zhou, refused to clear him for knee surgery until after certain
15 tests were performed, but plaintiff was cleared for surgery after those tests occurred. Dr. Zhou
16 performed a heart catheterization that showed no significant artery disease. Tr. 17, 325-26. Dr.
17 Zhou also noted that plaintiff had "done well" since the catheterization and denied symptoms of
18 cardiac dysfunction. Tr. 17, 323, 405. Approximately six months after opining that plaintiff was
19 disabled due to his cardiac impairments, Dr. Levine opined that plaintiff had "significant
20 improvement on his most recent cardiac studies." Tr. 17, 235. Accordingly, the ALJ cited
21 substantial evidence in rejecting Dr. Levine's opinion that plaintiff was disabled due to his

22 ¹⁴ *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

23 ¹⁵ *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir. 1985) (explaining that when a "nontreating physician's opinion rests on objective medical tests, it must be viewed as substantial evidence.").

1 cardiac impairments.

2 However, the ALJ did not provide sufficient reasons for rejecting Dr. Levine's opinion
3 that plaintiff suffered from "marked" limitations related to his knee condition. There is no
4 indication that the medical evidence related to the plaintiff's improved cardiac condition was
5 relevant to his knee condition. As set forth more fully above regarding plaintiff's credibility, the
6 ALJ erred in relying on an out of context portion of Dr. Hunter's opinion and on an x-ray,
7 despite undisputed MRI findings. Accordingly, the ALJ failed to provide specific and legitimate
8 reasons supported by substantial evidence to reject Dr. Levine's opinion that plaintiff's knee
9 impairment caused marked limitations.

10 **C. Testimony of Lay Witness Elizabeth Hounsel**

11 Lay witness Elizabeth Hounsel, plaintiff's roommate, testified that plaintiff performs only
12 very limited and occasional household chores, is often fatigued, frequently uses crutches, and can
13 stand for about 15 minutes to wash dishes or prepare a simple meal. Tr. 56-57; *id.* at 141-49.
14 The ALJ did not consider Ms. Hounsel's testimony, finding that her "statements are largely
15 based on the claimant's self-report to the witness and are not consistent with the medical
16 evidence of record and the claimant's own report of his abilities." Tr. 18. Because the ALJ
17 erred in discounting plaintiff's credibility, she also erred in rejecting the lay witness testimony
18 because it was based on the plaintiff's own reports. Despite the ALJ's finding of an
19 inconsistency, Ms. Hounsel's reports of the plaintiff's activities are consistent with the plaintiff's
20 reports. In addition, the ALJ's assertion that Ms. Hounsel's statements were based on the
21 plaintiff's self-reports is unsupported and inconsistent with the record. Ms. Hounsel testified that
22 she was able to observe the plaintiff, her roommate of approximately four years, on a daily basis.
23 Tr. 54. Although the Commissioner argues that Ms. Hounsel worked full time during the day,

1 she testified that she was home every day by 4:00 p.m., and as a “homebody,” was able to
2 observe him in the evenings and on weekends. Tr. 54. Neither the law nor common sense
3 requires that a lay witness observe a claimant constantly. Instead, “friends and family members
4 in a position to observe a claimant’s symptoms and daily activities are competent to testify as to
5 [his] condition.”¹⁶ Finally, the ALJ stated that Ms. Hounsel’s testimony was inconsistent with
6 the medical reports, but as set forth above, it was fully consistent with Dr. Levine’s reports and
7 other medical evidence regarding plaintiff’s knees. Accordingly, the ALJ erred in rejecting Ms.
8 Hounsel’s testimony.

9 **D. Plaintiff’s RFC**

10 Plaintiff contends that the ALJ erred in assessing his RFC in several ways. First, he
11 argues that the ALJ failed to consider his insomnia and likely sleep apnea. An ALJ is not
12 required to discuss all evidence presented.¹⁷ Instead, the ALJ must discuss the reasons why
13 “significant, probative evidence has been rejected.”¹⁸ In 2007, plaintiff underwent a sleep
14 evaluation and the physician concluded that plaintiff “appears to have some symptoms which
15 suggest obstructive sleep apnea” and he “may also be experiencing insomnia as well.” Tr. 363.
16 The physician recommended additional testing before recommending treatment options. There is
17 no evidence that plaintiff followed up on the condition. Nor do the physicians opine that the
18 sleep conditions resulted in work-related limitations. Accordingly, the ALJ did not err in failing
19 to include sleep apnea and insomnia in plaintiff’s RFC.

20 Second, plaintiff argues that the ALJ failed to consider plaintiff’s professed need to use
21 crutches when outside his home. As explained above, the ALJ did not err in that finding. Third,

22 ¹⁶ *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993).

23 ¹⁷ *See, e.g., Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984).

¹⁸ *Id.* at 1395.

1 plaintiff contends that the ALJ failed to consider other limitations noted by plaintiff and Ms.
2 Hounsel because the ALJ improperly rejected their testimony. Because the ALJ improperly
3 rejected their testimony, he improperly rejected the limitations they discussed.

4 **E. Reevaluation of the Evidence**

5 Having concluded that the ALJ erred in rejecting the testimony of plaintiff and Ms.
6 Hounsel and portions of Dr. Levine's opinion, the Court must determine the appropriate remedy.
7 Plaintiff contends that the Court should credit the improperly rejected evidence as true and direct
8 the immediate award of benefits.¹⁹ However, application of the credit-as-true rule is not
9 mandatory where there are "'outstanding issues that must be resolved before a proper disability
10 determination can be made.'"²⁰

11 In this case, crediting as true would not result in the immediate payment of benefits.
12 Even if Dr. Levine's opinion regarding plaintiff's knee impairments is credited as true, it does
13 not necessarily establish that plaintiff is limited to only sedentary work as he claims. Rather, Dr.
14 Levine's opinion that plaintiff was limited to sedentary work was based on both his cardiac and
15 knee impairments, and the ALJ properly rejected the opinion as to the severity of the cardiac
16 impairments. Moreover, it is unclear whether crediting the lay witness testimony would result in
17 the immediate payment of benefits. Because the hypothetical to the vocational expert did not
18 address the improperly discredited evidence, remand for further proceedings is warranted.²¹
19 Accordingly, this case will be remanded for further administrative proceedings.

20 **CONCLUSION**

21 For the foregoing reasons, the Court recommends that the Commissioner's decision be

22 ¹⁹ See, e.g., *Lingenfelter v. Astrue*, 504 F.3d 1018, 1040-41 (9th Cir. 2007).

23 ²⁰ *Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (quoting *Vasquez v. Astrue*, 572 F.3d 586, 593 (9th Cir. 2009)).

²¹ See e.g., *Vasquez*, 572 F.3d at 597.

1 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,
2 the ALJ should (1) reevaluate the credibility of plaintiff and Ms. Hounsel, (2) reevaluate Dr.
3 Levine's opinions, (3) conduct a new RFC assessment using all properly considered evidence,
4 (4) consider plaintiff's age, and (5) redetermine if plaintiff is disabled using the updated RFC, if
5 warranted.

6 Objections, if any to this Report and Recommendation must be filed and served no later
7 than **November 7, 2011**. If no objections are filed, the matter will be ready for the Court's
8 consideration on that date. If objections are filed, any response is due within 14 days after being
9 served with the objections. A party filing an objection must note the matter for the Court's
10 consideration 14 days from the date the objection is filed and served. Responses to objections
11 must be filed no later than 14 days after being served with objections. Objections and responses
12 shall not exceed twelve pages. The failure to timely object may affect your right to appeal.

13 DATED this 24th day of October, 2011.

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17 BRIAN A. TSUCHIDA
18 United States Magistrate Judge
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